temporary restraining order (TRO) and order to show cause re: preliminary injunction. The Court denied the TRO requests on May 14, 1996, and set a briefing schedule for the requests for preliminary injunction. The Court also consolidated the two actions for trial pursuant to Federal Rule of Civil Procedure 42(a).

The parties submitted briefs according to the schedule set by the Court. On June 20, 1996, the Court ordered the parties to submit supplemental briefing on the issue of the bond requirement under Federal Rule of Civil Procedure 65(c), which briefing was submitted in a timely manner. A hearing was held in this matter on July 2, 1996.

## DISCUSSION

### I. Legal Standard for Preliminary Injunction

Federal Rule of Civil Procedure 65 authorizes the Court to grant preliminary injunctive relief. This Circuit applies the traditional test for determining whether this equitable remedy is warranted. "Under the traditional test, a party is entitled to a preliminary injunction if it demonstrates: (1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor. These are not two independent tests, but the extremes of the continuum of equitable discretion." National Wildlife Fed. v. Burlington Northern R.R., 23 F.3d 1508, 1510 (9th Cir. 1994) (citing Fund for Animals, Inc. v. Lujan, 962 F.2d 1391 (9th

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Covenant of Good Faith and Fair Dealing, Misappropriation of Trade Secrets and Unjust Enrichment. (96-1692 Complaint.)

Cir. 1992).

Additionally, "[i]n cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." Fund for Animals, 962 F.2d at 1400.

II. Application

**A. Likelihood of Success on the Merits**

1. Breach of Contract -- Billing Agreements

Plaintiffs AT&T's and MCI's second claim for relief, and plaintiff Sprint's fifth claim for relief, assert that defendants have breached the Billing Agreements.

**a. Legal Standard**

To prevail on a claim for breach of contract, the plaintiff must allege and prove facts sufficient to establish the following: (1) a contract; (2) plaintiff's performance or excuse for non-performance; (3) defendant's breach; and (4) resulting damage to plaintiff. Reichert v. General Ins. Co. of Am., 68 Cal.2d 822, 830 (1968); 4 Witkin, California Procedure § 464 (3rd ed. 1985).

**b. The Billing Agreements**[3]

**Exhibit D ("Proprietary Information")** section 3 of the **Pacific Bell/AT&T Billing Agreement** controls the handling of proprietary information which is provided under the Billing

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[3] The Billing Agreements between Pacific Bell and MCI, and Pacific Bell and Sprint were filed with the Court under seal. Defendants have conceded that there is no substantive distinction between the three Billing Agreements with respect to the provisions at issue in this action. Based on a review of the Agreements, the Court concurs with that assessment.

Agreement. Paragraph B provides, in relevant part, that

> Proprietary Information described above shall . . . be held in confidence by the Receiving Party . . . shall not be disclosed to third persons but may be disclosed to contractors and agents who have a need for it . . . shall be used for the purposes stated herein; and may be used or disclosed for other purposes only upon such terms and conditions as may be mutually agreed upon by the Parties in writing.

(Banco Decl. Ex. 1 p. 2 (emphasis added).) Paragraph C of section 3 further provides that

> Each Party acknowledges that a Party's Proprietary Information may be commingled with Information of the other Party. Accordingly the Parties shall, to the extent practicable, use good faith efforts to ensure that such Proprietary Information shall be masked or rendered mechanically inaccessible to the other Party. However, there may be instances in which efforts to mask or screen such Proprietary Information are impracticable, or in which disclosure is inadvertent. In such instances, the Receiving Party will neither use or disclose the Proprietary Information, except as required to fulfill its obligations under this Agreement, and shall put in place procedures as described in the preceding Paragraphs.

(Banco Decl. Ex. 1 p. 2-3 (emphasis added).)

c. **Application**

Pacific Bell is clearly in breach of its Billing Agreements with the plaintiffs. There is no dispute that those Billing Agreements are contracts. (C-96-1692 Compl. ¶14; C-96-1692 Answer ¶ 11; C-96-1691 Compl. ¶¶ 14, 24; C-96-1691 Answer ¶¶ 11, 21.) There is no dispute that plaintiffs have regularly transmitted databases containing long distance information to Pacific Bell pursuant to those Agreements. (C-96-1691 Answer ¶ 14; C-96-1692 Answer ¶ 14.) There is also no dispute that the transmitted information is confidential and proprietary within the meaning of the Billing Agreements. (C-

96-1691 Answer ¶ 16; C-96-1692 Answer ¶ 16.) Defendants further admit that Pacific Bell uses the information provided by the plaintiffs as part of the calculation of the TBR. (See Elizondo Decl. ¶¶ 7-8.)

Defendants argue that Pacific Bell has not infringed the Billing Agreements because those agreements do not mention the TBR or prohibit use of the TBR. They argue that since plaintiffs do not own the information on customers' bills, and are at no time aware of the TBR, use of the TBR is not restricted by the Agreements.

This argument misconstrues plaintiffs' claim, which is concisely and accurately stated in plaintiffs' reply brief. "Ownership of [the TBR] is irrelevant to this dispute. Pacific is free to obtain such billing information from the customer. At issue is Pacific's misappropriation of information from the proprietary billing databases created by plaintiffs and made available to Pacific for the limited purposes of billing and collecting for long distance services." (Reply at 1-2 (emphasis in original).)

Defendants' program uses the TBR from the billing database which is created by combining the information transmitted from the plaintiffs with defendants' other billing information. It is the use of that database that constitutes a breach of the Billing Agreements, not the use of the TBR itself. It is undisputed that the information transmitted by plaintiffs is used to create the TBR. (Elizondo Decl. ¶¶ 7-8.) Since the transmitted information falls within the Agreements, creation of the TBR is a use of that information, which is governed by the Agreements. Furthermore, the billing database which contains the TBR for each customer is created by commingling plaintiffs' proprietary information with Pacific Bell's information. The use of that commingled database falls squarely within section 3(C) to Exhibit D of the AT&T/Pacific Bell Agreement, and similar provisions in the MCI/Pacific Bell and Sprint/Pacific Bell Billing Agreements.

Defendants do not assert that the PB Awards program is one of the purposes of the Billing Agreements, and admit that the plaintiffs have not authorized the use of their proprietary information as part of the PB Awards program. (C-96-1691 Compl. ¶¶ 43-44; C-96-1691 Answer ¶¶ 39-40; C-96-1692 Compl. ¶¶ 42-43; C-96-1692 Answer ¶¶ 38-39.) Therefore, Pacific Bell's use of the TBR from the billing database is a breach of the Billing Agreements.

Since the evidence and admissions which are before the Court <u>clearly</u> demonstrate that Pacific Bell's use of the TBR data from the billing databases breaches the Billing Agreements, plaintiffs have demonstrated a strong likelihood that they will succeed on their breach of contract claim.

2. <u>Telecommunications Act of 1996</u>

Plaintiffs' first claims for relief assert that, in addition to violating the Billing Agreements, defendants' use of their databases in its PB Awards program violates the Telecommunications Act of 1996 ("the 1996 Act"), 47 U.S.C. § 222. Defendants dispute this contention, and assert that the TBR information in question belongs to the customers, and not the plaintiffs, pursuant to section 222(c) and 222(f)(1)(B) of the 1996 Act.

### a. Legal Standard

Section 222 of the Telecommunications Act of 1996 provides, in relevant part:

> (a) In general
>
> Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers . . . and customers . . .
>
> (b) Confidentiality of carrier information
>
> A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.
>
> (c) Confidentiality of customer proprietary network information
>
> (1) Privacy requirements for telecommunications carriers
>
> Except as provided by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

47 U.S.C. § 222(a)-(c) (emphasis added).

Customer Proprietary Network Information ("CPNI") is defined as:

> (A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

47 U.S.C. § 222(f)(1).

The meaning and scope of these provisions appears to be a question of first impression.

b. Application

As discussed above, the issue in this case is not, as defendants argue, whether defendants' use of the TBR or total amount each customer spends on telecommunications services each month as the basis for awarding points in the AB Awards program violates the 1996 Act. Rather, the issue is whether defendants' use of plaintiffs' databases as part of the process that is used to create the TBR database used in the PB Awards program violates the 1996 Act.

Plaintiffs contend that defendants' use of the databases transmitted by the plaintiffs violates 47 U.S.C. § 222(a). Plaintiffs assert that these databases are proprietary information, and that Pacific Bell has breached its duty to protect the confidentiality of the databases. Defendants argue that the TBR is "information contained in the bills pertaining to telephone exchange service received by a customer of a carrier" and is therefore CPNI under 47 U.S.C. § 222(f)(1)(B). Defendants further argue that since they are using this CPNI "with the approval of the customer", their actions are authorized by § 222(c)(1).

The plain language of section 222 supports defendants' argument that all of the information "contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier" is CPNI.[4] 47 U.S.C. § 222(f)(1)(B). However, the fact that the amount of an individual customer's TBR is CPNI does not defeat plaintiffs' claim. Plaintiffs' databases do not appear on customers' bills, and therefore the databases are not CPNI, even if some of the data within those databases is.

Further, section 222(c)(1) does not apply to all CPNI. This section only applies to CPNI which a carrier receives "by virtue of its provision of a telecommunications service". 47 U.S.C. § 222(c)(1). Pacific Bell does not receive the plaintiffs' databases, which are used to create the TBR database that defendants are using, by virtue of providing a telecommunications service. It receives that information by virtue of providing billing services.[5] Therefore, while those

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[4] Plaintiffs contend that section 222(f)(1)(B) must be construed in connection with (f)(1)(A), such that only information which meets both requirements is CPNI. This is not a reasonable construction of the statute. Subsections (A) and (B) each start with the word "information" and describe different types of information. The plain meaning of these subsections is that CPNI includes both the information discussed in subsection (A) and the information discussed in subsection (B). Adopting plaintiffs' reading would lead to a cramped interpretation of subsection (A) where, for example, information regarding the technical configuration of services provided to a customer would not be CPNI, and therefore would not be protected, unless that information appeared on the customer's bill.

[5] 47 U.S.C. § 153, as amended by the 1996 Act, defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public. . . ." 47 U.S.C. § 153(46). Telecommunications is defined as "the

databases may <u>contain</u> CPNI, their use is <u>not</u> governed by section 222(c)(1).[6]

Instead, plaintiffs' proprietary information is protected by section 222(a). The question, therefore, is whether the PB Awards program as currently implemented violates the section 222(a) duty to protect the confidentiality of that information.

Defendants' use of the TBR databases which are derived from plaintiffs' proprietary information results in the unauthorized disclosure of that information. Plaintiffs have proffered evidence demonstrating that the average local phone bill is $25.00 and thus that there is a direct relationship between the amount of a customer's TBR and the amount of that customer's total long distance usage.[7] (Mannella Decl. ¶¶ 15-

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transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Pacific Bell's provision of billing services to plaintiffs is not "telecommunications" under this definition, and thus cannot be a "telecommunications service."

[6] Indeed, the TBR is not the only information which appears on a customer's bill. Most, if not all, of the specific information related to long distance usage which plaintiffs transmit to Pacific Bell under the Billing Agreements appears on a customer's bill. All of this information is therefore CPNI pursuant to the definition in 222(f)(1)(B). If the mere fact that this information is CPNI were sufficient to relieve Pacific Bell of its duty <u>to plaintiffs</u> to protect the confidentiality of the databases, then the portions of plaintiffs' databases which contain any information that also appears on a customer's bill would not belong to the plaintiffs under defendants' theory.

[7] Defendants have not provided any evidence to rebut this assertion, but merely assert that the <u>exact</u> amount of a particular customer's long distance usage cannot be determined

16.) By providing parties who are not subject to the Billing Agreement, e.g., Pacific Bell Extras or Brielery & Partners (the primary "fulfillment center" contractor for the PB Awards program), with TBR information, Pacific Bell provides a list of plaintiffs' customers who have high TBR's, and who are thus likely to be heavy users of long distance services.[8] This list of plaintiffs' best customers is clearly the sort of proprietary information which Congress intended to protect by enacting section 222(a) of Title 47.

Plaintiffs have therefore demonstrated that they are likely to show that defendants' have violated section 222(a) of the 1996 Act.

3. Misappropriation of Trade Secrets

Plaintiffs AT&T's and MCI's sixth claim for relief, and plaintiff Sprint's fourth claim for relief, assert claims for violation of the Uniform Trade Secrets Act.

**a. Legal Standard**

Under the Uniform Trade Secrets Act ("UTSA"), codified in California as California Civil Code §§ 3426-3426.10, a "trade

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from the TBR.

[8] Plaintiffs proffer evidence that "[t]he single best predictor of future long distance usage is actual past usage of long distance." (Piccirilli Decl. ¶ 5.) Furthermore, "customers who spend $25 per month on long distance are considered heavy users of long distance and are among the most profitable long distance customers." (Mannella Decl. ¶ 15.) Defendants do not respond to this evidence. Since plaintiffs have also demonstrated that the average local bill is $25, the $50 minimum requirement for the PB Awards program serves to identify customers who probably spend more than $25 per month on long distance, and are thus plaintiffs' most profitable customers.

secret" is defined as:

> a formula, pattern, compilation, program, device, method or technique, or process that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
>
> (2) Is the subject matter of efforts that are reasonable under the circumstances to maintain its secrecy.

Cal. Civ. Code § 3426.1(d). Both of these elements must be established before a protectable trade secret can be found. <u>See</u> <u>American Credit Indemnity Co. v. Sacks</u>, 213 Cal. App. 3d 622, 630-31 (1989).

The UTSA defines "misappropriation" as follows:

> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; <u>or</u>
>
> (2) Disclosure or use of a trade secret of another without express or implied consent by a person who: . . . (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was: . . . (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; . . .

Cal. Civ. Code § 3426.1(b) (emphasis added). Actual misappropriation is not necessary to sustain a request for injunctive relief; the mere threat of misappropriation is sufficient. Cal. Civ. Code § 3426.2 ("[a]ctual <u>or</u> threatened misappropriation may be enjoined.").

/ / / /

b. Application

Defendants do not raise any specific objection with respect to plaintiffs' trade secrets claims; apparently relying on their general argument, which the Court has rejected, that plaintiffs do not own the TBR data in question. Applying the standards of the UTSA, the Court finds that plaintiffs have demonstrated that they are likely to succeed on this claim.

i. Trade Secret

The databases which plaintiffs transmit to Pacific Bell are trade secrets. Those billing and usage databases are compilations of data which are electronically transmitted to Pacific Bell by the plaintiffs. Each plaintiffs' data is transmitted in a unique proprietary format, and can only be accessed by Pacific Bell through the use of a proprietary system specifically designed for each plaintiff. (Elizondo Decl. ¶ 6.) Plaintiffs have introduced uncontroverted evidence that the databases derive independent economic value from not being known to the public or to competitors, and that the databases are the subject of reasonable efforts to maintain their secrecy. (Banco Decl. ¶¶ 7-10; 18-19 (AT&T); Arnett 5/7/96 Decl. ¶¶ 7-10; 18-19 (MCI); Morrison Decl. ¶¶ 7-10; 18-19 (Sprint).)

ii. Unauthorized Disclosure

Plaintiffs have also demonstrated that defendants are using the information in their databases as part of the PB Awards program without the permission of the plaintiffs, and that at the time of use, defendants had reason to know that the information was "acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use."[9] Cal. Civ. Code § 3426.1(b)(2)(B)(ii); See Ojala v. Bohlin, 178 Cal. App. 2d 292, 300 (1960) (having received plaintiff's confidential information for one purpose, defendant could not use it for another). As discussed above, the TBR database which defendants use to calculate the awards in the PB Awards program is created, in part, by using the proprietary databases which plaintiffs provided under the Billing Agreements. Furthermore, as discussed, the Billing Agreements prohibit Pacific Bell from using those databases in this fashion. The Billing Agreements also require Pacific Bell to maintain the confidentiality of those databases, and to limit their use to that which is necessary to perform the Billing Agreements.

Therefore, plaintiffs have demonstrated that they are likely to succeed on their Trade Secrets claim.

4. Unfair Competition

Plaintiffs AT&T's and MCI's fourth and fifth claims for relief, and plaintiff Sprint's second and third claims for relief, assert claims for Unfair Competition under section

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[9] Plaintiffs do not distinguish Pacific Bell from the other defendants. To the extent that the other defendants are not parties to the Billing Agreements, their receipt of the trade secrets at issue is "use . . . by a person who . . . [a]t the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was . . . [d]erived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use." Cal. Civ. Code § 3426.1(g)(2)(B)(iii).

43(a) of the Lanham Act and under California Business and Professions Code §§ 17200.[10] Plaintiffs assert that defendants' advertisements for the PB Awards program are misleading because: (1) they suggest that plaintiffs are affiliated with the PB Awards program, and (2) they include releases which are ineffective.

**a. Legal Standard**

To prevail on a claim under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), plaintiffs must demonstrate that (1) defendants "made false or deceptive advertisements and representations to customers"; (2) "those advertisements and representations actually deceived a significant portion of the consuming public"; and (3) plaintiffs were injured by defendants' conduct. William H. Morris Co. v. Group W, Inc., 66 F.3d 255, 257 (9th Cir. 1995). Although most section 43(a) claims involve an assertion that a defendant attempted to pass its goods off as those of the plaintiff, the Ninth Circuit has not limited section 43(a) to "passing-off" claims. Harper House, Inc. v. Thomas Nelson Inc., 889 F.2d 197, 208 (9th Cir. 1989).

**b. Implication that plaintiffs endorse PB Awards**

Plaintiffs assert that defendants' advertisements for the

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[10] A claim for unfair competition under the Cal. Bus. & Prof. Code §§ 17200 et seq. is "substantially congruent" to a claim under the Lanham Act. See Academy of Motion Picture Arts v. Creative House, 944 F.2d 1446, 1457 (9th Cir. 1991). Accordingly, the Court will treat these claims as one for the purpose of this motion.

PB Awards program misleadingly suggest that the plaintiffs are affiliated with the PB Awards program. Plaintiffs argue that "by emphasizing the applicability of the program to <u>all</u> telephone charges, including long distance" the advertisements suggest that the plaintiffs, long distance companies, endorse the program. Defendants assert that the advertisements do not make any such suggestion.

Plaintiffs provide no evidence that any customers have actually been confused, but instead argue that confusion is apparent from the face of the advertisements.[11] This Court disagrees. Only an aggressive misreading of the advertisements would lead to this conclusion.

The direct mailer advertisement submitted by plaintiffs states:

> Only Pacific Bell Awards lets you earn Award Points for your entire phone bill. We include local calls, your long distance calls billed through Pacific Bell, services like Call Waiting -- everything included in your bill.
>
> And it doesn't matter if your long distance company is already awarding you for long-distance calls -- you don't have to give that up! Because we'll even reward you for your long distance calls so long as they are billed through Pacific Bell. . . .

(Bisazza 5/7 Decl. Ex. 1.) The direct mailer also includes two columns of "Award Partners" which contain the logos of several companies. Plaintiffs' names do not appear anywhere

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[11] Plaintiffs do submit the self-serving declarations of their employees that, in their opinion, the advertisements are misleading. (Bisazza 5/7/96 Decl. ¶ 11 (AT&T Division Manager, Pacific Region); Morrison Decl. ¶ 26 (Sprint Vice President of Billing Services); Arnett Decl. ¶ 27 (MCI National Director of LEC Billing and Collections).) The Court does not find these declarations persuasive.

in the direct mailer.

The Court rejects plaintiffs' assertion that because the mailer states that customers can receive points for long distance calls billed through Pacific Bell it implies that plaintiffs endorse the program. The mailer clearly distinguishes the PB Awards program from long distance companies' programs. Further, the mailer distinguishes defendants from the long distance companies, referring to defendants as "we", as opposed to "your long distance company". Finally, the mailer clearly lists the names of "Awards Partners", which list does not include any of the plaintiffs. The Court therefore finds that this mailer does not suggest that plaintiffs endorse the PB Awards program.[12]

As the Court finds that the advertisements do not misleadingly suggest that plaintiffs endorse the PB Awards program, plaintiffs have not demonstrated any likelihood of success on this claim.

**c. Ineffective Releases**

Plaintiffs also contend that the advertisements are misleading because they suggest that customers can simply sign a release and enable defendants to use the TBR to calculate award points. The Court need not address whether those statements regarding the effectiveness of the releases are false or misleading, however, because plaintiffs have not shown that the advertisements will cause any injury to

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[12] The other advertisements submitted by the plaintiffs are similarly not misleading.

plaintiffs.[11]

Plaintiffs contend that, since the releases are ineffective, injury must be presumed to follow from defendants' false representations because customers will assume that plaintiffs have endorsed the PB Awards program. They argue that "[w]hen plaintiffs' customers find out that they cannot earn [points based on long distance usage], because the current program violates the law, they will attribute Pacific's unlawful and deceptive practices to plaintiffs."

As discussed earlier, plaintiffs have not demonstrated that defendants' advertisements suggest that the PB Awards program is endorsed by the plaintiffs. Therefore, there can be no implication that plaintiffs participated in any alleged wrongful program. To the contrary, it is clear from the press reports which have been generated by this case that plaintiffs do not endorse the PB Awards program, and in fact oppose it. (Hewitt 6/25/96 Decl. Ex. B; Mazzarella 5/13/96 Decl. Exs. A & B.)

It is possible that, as plaintiffs' assert, customers will blame the plaintiffs for the fact that the PB Awards program might be modified or discontinued as a result of this

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[11] The Court notes, however, that the ads are not technically false. While defendants are prohibited from using plaintiffs' proprietary information, defendants may use TBR information if it is not obtained from plaintiffs. Furthermore, the fact that defendants will not be allowed to operate the PB Awards program in the exact manner in which they originally intended does not necessarily make their initial representations false or misleading at the time they were made.

action. While plaintiffs have the legal right to strictly enforce protections they have under contract and statute, they have no right to be insulated from the public's reaction to their election to exercise those protections. Such a hypothetical negative reaction to plaintiffs' decision to contest the PB Awards program would not be attributable to defendants, and/or to a belief that plaintiffs were complicit in the "unlawful or deceptive" PB Awards program, but rather on a belief that plaintiffs are overly litigious. Moreover, this is only one of a myriad of possible public reactions to this action; the parties have submitted no evidence that there will be any public reaction at all.

Assuming arguendo that the releases are ineffective and that the advertisements are misleading, the Court finds that plaintiffs have not demonstrated that the alleged misrepresentations have or will cause any injury to plaintiffs. Since injury is a required element of the unfair competition claim, plaintiffs have not demonstrated any likelihood of success on this claim.

**B. Immediate and Irreparable Harm**

Plaintiffs contend that defendants' actions are harming plaintiffs in three ways. First, plaintiffs contend that defendants are using plaintiffs' proprietary information to solicit plaintiffs' customers. Second, plaintiffs contend that loss of control over their trade secrets is itself a harm that warrants an injunction. Third, plaintiffs contend that defendants' "misrepresentations" are likely to cause plaintiffs to lose goodwill with their customers. Consistent with their assertion that plaintiffs do not own the TBR information, defendants assert that no harm is occurring.

1. Solicitation/Loss of Customers

Plaintiffs contend that defendants are wrongfully soliciting plaintiffs' best customers, based on the information obtained from plaintiffs' databases as to which customers are the heaviest users of long distance. Use of trade secrets to solicit customers is a irreparable harm which will support the granting of a preliminary injunction. See American Credit Indemnity Co., 213 Cal. App. 3d at 637. However, plaintiffs' assertions are not supported by the evidence.

Plaintiffs contend that defendants are using the PB Awards program to "lock in" customers who will remain with defendants in the local market and switch to Pacific Bell Communications for long distance service when that service is available.

With respect to the long distance market, plaintiffs cannot show immediate injury because there is no evidence that Pacific Bell Communications will be providing long distance service in the near future. Indeed, in a Wall Street Journal interview, plaintiff AT&T's Chairman asserted that the local Bells are not likely to provide long distance service until the next century.[14] (Hewitt 6/25/96 Decl. Ex. C.) Whether or

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[14] The declarations submitted by plaintiffs in connection with this motion contain far less pessimistic assessments of defendants' ability to compete with the plaintiffs for long distance customers in the near future. (E.g., Levine 6/4/96 Decl. ¶ 12 (estimating Pacific Bell will enter long distance

not defendants would like to use this information to solicit long distance customers at some undefined time in the future is irrelevant to this motion. Plaintiffs have not shown that there is any current or imminent solicitation of their long distance customers.

With respect to local customers, plaintiffs have not demonstrated that defendants are soliciting plaintiffs' local customers. Indeed, plaintiffs have not demonstrated that they have any local customers. Nor can plaintiffs make that showing because plaintiffs are not currently providing local service. Plaintiffs do not intend to provide local services for 6 to 12 months. (E.g., Levine Decl ¶ 13).

At best, plaintiffs have shown that defendants are soliciting their own customers in an attempt to discourage those customers from switching to plaintiffs for local service when such service becomes available.[15] However, plaintiffs have not demonstrated any likelihood that current customers of defendants will choose to stay with Pacific Bell simply because of the PB Awards program. Indeed, plaintiffs' evidence suggests that it is impossible to gain any significant number of Award points within one year (Mannella

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market in early 1997).)

[15] Defendants admit that this program is intended to protect their local customer base against competition from the plaintiffs. "The purpose of [PB] Awards is to retain Pacific Bell residential customers, to thank them for their loyalty to Pacific Bell, and to provide a vehicle to encourage customers to stay with Pacific Bell in the advent of competitive offerings in the market of local telephone exchange service." (Hewitt 5/7/96 Decl. ¶ 4.)

Decl. ¶ 14); therefore, the PB Awards program, by itself, would seem to provide little incentive for customers to remain with Pacific Bell.

Indeed, the opposite inference is equally likely. Plaintiffs' customers may be inclined to transfer to plaintiffs' local service for the convenience of unifying their local and long distance services.[16] There simply is no evidence in the record as to which, if either, of these possibilities will occur. Thus, the Court finds that plaintiffs have not demonstrated that defendants' current use of plaintiffs' proprietary information is having any present or imminent effect on plaintiffs' present or future customer base, a requirement for granting of preliminary relief.

2. Loss of Control over Secrets

Plaintiffs also contend that their loss of control over their trade secrets is itself an irreparable harm. This argument is supported by the case law. See, e.g., Peripheral Devices Corp. II v. Ververs, 1995 U.S. Dist. LEXIS 11389*27-28 (N.D. Il. August 9, 1995) ("Once information loses its

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[16] The Court finds that the intense competition between plaintiffs for customers, and the wide variety of deals and incentive programs which plaintiffs use to induce customers to change long-distance providers, is a proper subject of judicial notice under Federal Rule of Evidence 201. Given the nearly daily barrage of television, radio, and print advertisements regarding this competition (which rivals the "Cola Wars" of the 1980's), the Court finds that this competition is "generally known within the territorial jurisdiction" of this Court, and is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." F.R.E. 201(b). The parties stated at the hearing that they have no objection to the Court's taking judicial notice of this information.

confidentiality, there is no amount of money or effort that will make it confidential again."). As the Court has found that defendants are misappropriating plaintiffs' trade secrets, the further misappropriation of those secrets constitutes an immediate and irreparable harm which will support the issuance of an injunction. See Tracer Research Corp. v. National Environmental Service Co., 843 F. Supp. 568, 578 (D. Ariz. 1993) ("An injunction against the use and disclosure of a trade secret that has been shown to have been misappropriated will preserve and not alter the proper status quo under the law.").

3. Loss of Goodwill from Misrepresentations

As discussed above, the Court finds that plaintiffs have not demonstrated that they are being injured by the allegedly misleading advertisements, or that it is likely that such injury will occur in the immediate future.

C. **Balance of Hardships**

Defendants did not address this issue, therefore, the only hardships which the Court can analyze are those that are raised by plaintiffs or are obvious from the record.

1. Harm to Plaintiffs if Injunction is Denied

As discussed above, defendants are breaching the Billing Agreements and misappropriating plaintiffs' trade secrets. These misdeeds allow defendants to compile a list of plaintiffs' best customers, and to save money by exploiting plaintiffs' databases rather than create their own. The Court finds that a continuation of this activity during the pendency of this action poses some risk of harm to plaintiffs.

2. <u>Harm to Defendants if Injunction is Granted</u>

Granting an injunction will require defendants to modify the PB Awards program, which will probably result in substantial costs to defendants. (Hewitt 6/24/6 Decl. ¶ 5 & Ex. A). However, since it is very likely that the PB Awards program as currently organized is violative of the Billing Agreements and federal and state law, the requirement that it be changed does not constitute a significant hardship.

Furthermore, as plaintiffs point out, defendants need not change the PB Awards program completely. Nor must defendants cease using TBR as the basis for the PB Awards Program, the circumstance that defendants argue will create a great deal of harm.[17] Defendants must merely discontinue using the proprietary databases provided by plaintiffs in connection with the PB Awards program. There is no suggestion that defendants may not simply create their own database of TBR amounts by acquiring the information directly from customers.

3. <u>Balance</u>

The Court finds that the balance of hardships described above favors the granting of an injunction.

**D. Public Interest**

Neither side has cited any public interest which would be affected by this injunction, and the Court finds that the

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[17] Defendants' supplemental briefing on the issue on the bond requirement only discusses harm to the defendants if they are enjoined from administering the PB Awards program on the basis of TBR, based on their representations to customers that TBR is the basis for the program, and on the databases which were created for the program which are based on TBR. (Hewitt 6/25/96 Decl. ¶¶ 3-5.)

availability vel non of the PB Awards program is not a matter of public interest. Compare Fund For Animals, Inc., 962 F.2d at 1401 (finding public interest where there was, inter alia, "[a] serious threat [to domestic cattle and humans] of brucellosis [a fatal disease]"); Belushi v. Woodward, 598 F. Supp. 36, 37 (D.D.C. 1984) (public interest in free speech).

E. **Balancing of Factors**

As discussed above, plaintiffs have demonstrated a strong likelihood of success on their breach of contract, trade secret, and telecommunications act claims. Plaintiffs have also demonstrated that defendants' conduct subjects them to a risk that the confidentiality of plaintiffs' proprietary information will be lost. Considering this showing, and the Court's finding that the balance of hardships favors plaintiffs, an injunction is warranted.

## III. Security[18]

As required by Federal Rule of Civil Procedure 65(c), the

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[18] All parties failed to address the bond requirement in their moving papers; the Court therefore ordered supplemental briefing on this issue. In their supplemental brief, plaintiffs argue that they did address the bond requirement in their TRO request, and that those arguments were incorporated by reference in the current motion.

Presumably, plaintiffs are referring to the notice of motion which they filed which purports to incorporate all "other papers and pleadings on file in this matter" into plaintiffs' current motion. This type of incorporation by reference is inadequate and unacceptable. The Court's Local Rules provide for a 25 page limit on any memorandum of points and authorities. Plaintiffs' motion used all 25 pages. Plaintiffs cannot avoid the page limitation by purporting to incorporate all arguments which were previously made in connection with other motions.

party seeking a preliminary injunction must post security to cover the "costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." F.R.C.P. 65(c). The amount of the bond "will generally be what the court deems sufficient to cover losses and damages incurred or suffered by the party enjoined if it turns out that the injunction should not have been granted." Dep Corp. v. Opti-Ray, Inc., 768 F. Supp. 710, 718 (C.D. Cal. 1991). The Court, however, has considerable discretion in determining the amount of the bond. This discretion extends to whether, in light of the likelihood of success on the merits, a minimal bond, or even no bond, is appropriate. See California v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1326 (9th Cir. 1985) ("the likelihood of success on the merits, as found by the district court, tips in favor of a minimal bond or no bond at all."); Scherr v. Volpe, 466 F.2d 1027, 1034 (7th Cir. 1972) (district court did not abuse discretion by failing to set a bond where there was a strong likelihood of success on the merits).

Defendants request that the bond be set at seventeen million dollars. They present evidence that modifying the PB Awards program will cost approximately $16,599,989 based on the current costs of implementing and advertising the program. (Hewitt 6/25/96 Decl. ¶ 6.) Plaintiffs, on the other hand, assert that no bond should be imposed, or, in the alternative, that the bond should be no higher than $50,000.

"[A] party has been wrongfully enjoined within the meaning of Rule 65(c) when it turns out the party enjoined had